Supreme Court, U.S.
FILED

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No.

In The

Supreme Court of the United States

October Term, 1997

JOSEPH P. MAYER, III and ELEANOR C. MAYER,

Petitioners,

vs.

ALLEN, MATKINS, LECK, GAMBLE & MALLORY; DAVID C. GRANT and DONALD S. GOTTESMAN,

Respondents.

On Petition for Writ of Certiorari to the Court of Appeal, State of California, Second Appellate District, Division Three

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Joseph Mayer is the general partner of a limited partnership. His wife, Eleanor, is a limited partner of the partnership. The Mayers entered into a series of agreementswith their partners, and others, regarding various lawsuits. According to the ruling in the case below, another limited partnership was appointed as the Mayers' attorney-in-fact and "irrevocable" agent for the purposes of those agreements.

That agency appointment, however, did not meet the legal standard for an agency coupled with an interest because the agency arose from a different source and at a different time than did the interest — and were, therefore, not "coupled." Despite that legal infirmity, the Second District Court of Appeal of the State of California held the agency to be irrevocable, thus forcing the Mayers to involuntarily accept the exercise of powers by an agent to whom they objected.

The issue presented is, thus, whether enforcement of an agency appointment as irrevocable, although it was not coupled with an interest, constitutes an impermissible involuntary servitude in violation of the Thirteenth Amendment of the United States Constitution.

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Joseph P. Mayer, III ("Joseph") and Eleanor C. Mayer ("Eleanor") (collectively, "the Mayers") respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Court of Appeal of the State of California, Second Appellate District, Division Three entered in this proceeding on April 9, 1998, in order to resolve an important federal question regarding application of the Thirteenth Amendment of the United States Constitution to irrevocable contracts and because the appellate court's decision conflicts with a decision of the United States District Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the Court of Appeal of the State of California, Second Appellate District, Division Three that gives rise to this petition is an unpublished decision which is reprinted in Appendix A ("App. A") at pages 1a-21a. The judgment of the Superior Court of the State of California is reprinted in Appendix B at pages 22a-23a. The Supreme Court of the State of California, the state court of last resort for the Mayers' claims, discretionarily declined the Mayers' petition for review on July 15, 1998. Its order is set forth at App. C, 24a.

STATEMENT OF JURISDICTION

The appellate decision which gives rise to this petition was rendered on April 9, 1998. App. A, 1. The California Supreme Court, the state court of last resort, discretionarily declined the petition for review on July 15, 1998. App. C, 24a. Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the order denying discretionary review by the state court of last resort.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1257(a).

STATUTES INVOLVED IN THIS CASE

The Thirteenth Amendment of the United States Constitution, section 1, provides:

> Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

STATEMENT OF THE CASE

The petitioners, the Mayers, are husband and wife and were partners in the Huntington Breakers Apartments, Ltd. ("HBAL"), a limited partnership that owned and developed the Huntington Breakers Apartments in Huntington Beach, California. Joseph was one of two general partners in the partnership and Eleanor was a limited partner.

As developer of the apartment complex, the partnership contracted with C.W. Driver ("Driver") in May, 1984 to build the complex. Joseph signed the construction contract solely in his capacity as a general partner of the partnership. Joseph and Eleanor, however, along with the other individual partners, executed personal guaranty agreements with Driver, guaranteeing payment of the construction contract.

In August, 1985, the partners in HBAL formed another partnership, the Huntington Breakers Managing Partnership ("HBMP"). HBMP was given a 1% limited partnership interest in HBAL, and was to act as the operating partner alongside the administrative corporate partner of HBAL.

After disputes arose between HBAL and the builder in November 1985, the builder walked off the job. Various lawsuits

ensued, including an action by Driver against HBAL and Joseph, as HBAL's general partner, for payment under the construction contract. Driver also sued the Mayers, individually, under the personal guarantees they signed. HBAL and the Mayers cross-complained against Driver for damages caused by Driver's incomplete and/or defective workmanship. (The action filed by Driver and the cross-complaints filed by HBAL and the other partners will be designated "the construction action.")

Respondents herein, the law firm of Allen, Matkins, Leck, Gamble & Mallory, and two of its attorneys, David C. Grant and Donald S. Gottesman, (collectively "Allen, Matkins"), represented both HBAL and the Mayers, *individually*, with respect to the construction action, both as to the complaint and the cross-complaints. Allen, Matkins, however, never represented HBMP, nor was HBMP ever a named party in any of the actions.

The Superior Court ordered the construction complaint to arbitration, even as to Joseph, who was named in Driver's complaint as individually liable under the construction contract. The court did not, however, order the issues relating to the individual guarantors to arbitration.

On December 31, 1986, during the progress of the underlying action, and as part of a complex financing agreement, HBAL assigned to the Mayers and the other partners of HBAL, including HBMP, all of its own interest in the construction action against Driver. Each partner was assigned an interest in the construction action proportionate to his, her or its interests in the partnership itself. Thus, HBMP obtained ***from HBAL***, assignment of a 1% interest in HBAL's rights in the construction action. At the same time, the other assignees — who also received proportionate assignment of HBAL's interests in the construction litigation from HBAL — appointed HBMP as the attorney in fact for handling the construction action.

The assignment and appointment document recited that HBMP's appointment as the attorney-in-fact for the other assignees was irrevocable. Notably, however, the ***power*** to control the litigation given in the appointment came from the other individual assignees while the 1% ***interest*** in the litigation itself came from the partnership, i.e., HBAL.

After four years of intermittent hearings, the arbitrators ultimately issued an award in favor of Driver in the approximate amount of $4.5 million. In opposing the enforcement of the arbitration award, the Mayers asserted that Driver was not properly licensed during the term of the construction. The trial court overruled the Mayers' objections and entered judgment against HBAL and Joseph.

Over the Mayers' objections, and after their notice of revocation of HBMP's appointment as their attorney-in-fact, HBMP entered into an agreement with Driver for settlement of the construction action. The Superior Court enforced the settlement agreement under California Code of Civil Procedure section 664.6, over the Mayers' objections.

Under the settlement agreement, the title insurer on the property, Transamerica, bought the judgment against HBAL, the Mayers and others from Driver for $3.9 million and concurrently released every judgment debtor, except the Mayers, from the judgment. That settlement agreement, as enforced by that trial court, however, left Joseph *individually* and solely liable *for the full judgment amount*. That settlement agreement, as enforced by that trial court's order, also dismissed all of the causes of action asserted against Driver by HBAL in the cross-complaint and also terminated the Mayers' individual claims in the cross-complaint.

Following the original entry of the arbitration award against them, HBAL and the Mayers, as well as the other individual

partners, jointly sued Allen, Matkins in a separate action for malpractice in its handling of the arbitration and construction litigation, the subsequent entry of judgment against them, and the loss of the individual partners' personal claims against Driver. In deciding whether to pursue a malpractice claim, the HBAL partners entered into a "Representation Agreement" in 1991. The Representation Agreement assigned to a three-member group, including Joseph and two of the other individual partners, the right to control the malpractice litigation by majority vote. The Representation Agreement set forth an allocation of any proceeds that might be generated from the malpractice action, again based on each partner's respective interests in the partnership.

In order to finance the malpractice action, among other things, the plaintiffs in the malpractice action subsequently entered into a litigation agreement with Transamerica, pledging to Transamerica a specified amount of any proceeds that might be generated in the Allen, Matkins action to Transamerica. That agreement was referred to as the "Cases Agreement."

Approximately three years into the malpractice suit, Allen, Matkins filed a motion for summary judgment/summary adjudication seeking an order determining that the individual partners did not have standing to sue Allen, Matkins for malpractice. That motion was denied. Two months later, Allen, Matkins, in conjunction with HBAL and the remaining plaintiffs other than the Mayers, filed a motion in limine, seeking an order to the effect that the Mayers did not have individual standing to sue Allen, Matkins, at least with respect to the malpractice claims asserted by HBAL. Rather, Allen, Matkins asserted, only HBAL, as the irrevocably appointed attorney-in-fact of the Mayers, could bring the action. In its motion, however, Allen, Matkins conceded that the Mayers retained their malpractice claims against Allen, Matkins to the extent Allen,

Matkins represented the Mayers individually in the underlying litigation. The Allen, Matkins motion also acknowledged that, to the extent such damages were legally recoverable, the Mayers had standing to assert claims for emotional distress resulting from the financial damage done to their interests in HBAL.

The separate motion in limine brought against the Mayers by HBAL, however, was broader and sought an order to the effect that, because of the "irrevocable" appointment of HBMP as their agent for purposes of the litigation, the Mayers had no standing ***whatsoever — even with respect to Allen, Matkins' representation of the Mayers' separate, distinct and independent personal interests in the underlying action.*** In light of the fact that Joseph was left, at the end of the day, with a multi-million dollar judgment pending against him ***individually*** in the construction action as the result of Allen, Matkins' malpractice, the Mayers' individual claims were obviously of extreme importance to the Mayers.

In each of the Mayers' responses to every attack on their standing to sue throughout the litigation below, the Mayers asserted the fundamental argument that because HBMP's power of appointment was not coupled to its interest in the litigation — because they each arose from different sources — the Mayers could not be forced to accept HBMP as their agent and that the agency was not only revocable but had, in fact, been revoked. Thus, throughout the litigation of the case below, the Mayers asserted their right to be free of the control of the unwanted agent. The trial court, in each ruling concluded that the agency appointment was irrevocable — thus forever binding the Mayers to HBMP.

Despite the clear admission by Allen, Matkins, on the record, that it represented the Mayers individually in the construction litigation, in addition to representing them in their

roles as partners of HBAL, the trial court granted HBAL's motion in limine, ruling that the Mayers had no individual standing to sue for malpractice. All the Mayers had, the court ruled, was a claim for emotional distress damages resulting from the financial injury caused by the malpractice committed against the partnership itself.

Ultimately, the trial court also granted Allen, Matkins' summary judgment motion even on the Mayers' remaining claim on the basis that the emotional distress damages resulting solely from an economic injury are not recoverable. The trial court's order was entered on that basis on January 16, 1997. That order is included in Appendix C and states:

> THIS COURT, having on December 16, 1996 denied the motion for new trial by plaintiffs and cross-defendants Joseph P. Mayer, III and Eleanor C. Mayer ("Mayers"), by ruling the Mayers are not the real parties-in-interest to bring actions for malpractice against defendants Allen, Matkins, Leck, Gamble & Mallory, David C. Grant and Donald S. Gottesman ("defendants") for defendants [sic] representation of the MAYERS in two separate actions titled *C.W. Driver v. Huntington Breakers Apartments, Ltd.*, Orange County Superior Court Case number 477394, and *Jon Tyler, Inc. v. Wilmore City Development, Inc.*, Los Angeles Superior Court Case number C613068, and that non-party Huntington Breakers Managing Partnership (HBMP) is the sole real party-in interest as to all of the Mayers' [sic] interest in this litigation, including all claims against defendants arising from defendants [sic] representation of the Mayers as individuals,

> ORDERS, ADJUDGES AND DECREES that Joseph P. Mayer III [sic] and Eleanor C. Mayer take nothing, and that Allen, Matkins, Leck, Gamble & Mallory, David Grant, and Donald Gottesman shall recover from Joseph P. Mayer, III and Eleanor Mayer costs of suit to be awarded according to a bill of costs which will be submitted at a later date.

App. B, 22a-23a.

On March 12, 1997, the Mayers timely appealed the judgment to the Court of Appeal for the State of California, Second Appellate District, Division Three. The Mayers again raised the irrevocable agency issue relevant to this petition in their Opening Brief on appeal, at pages 37-39 and in their Reply Brief on the appeal at pages 1-2.

On appeal, the Second District affirmed the rulings against the Mayers. App A, 1a, 21a. The appellate court concluded that the original assignment and appointment of HBMP encompassed the Allen, Matkins litigation and that the right assigned to HBMP to control the malpractice case was irrevocable. App A, 20a. That conclusion, however, not only violates the fundamental principles of agency law respecting irrevocable agencies, it violates the constitutional prohibitions against involuntary servitude expressed in the Thirteenth Amendment to the United States Constitution.

The Mayers timely filed their Petition for Review to the Supreme Court of the State of California. At pages 25-28 of their Petition for Review, the Mayers again raised the constitutional issue relevant to this petition. On July 15, 1998, the California Supreme Court summarily denied review, without comment on the constitutional, or any other, issue. App. C, 24a.

REASONS FOR GRANTING THE WRIT

Under long-established law, as reflected in the Restatement, an agency appointment is revocable: Neither the agent nor the principal can be compelled to abide the other against the will of either. Although the termination of an agency contract that is in violation of the terms of the contract may result in a claim for damages, it cannot preclude the termination itself.

This principle was recently expressed and reiterated by the United States Court of Appeals for the Third Circuit in *Government Guarantee Fund of the Republic of Finland v. Hyatt Corporation*, 95 F.3d 291, 300 (1996):

> [A]gency principles as expressed in the Restatements govern this case. Section 118 of the Restatement (Second) of Agency (1958) states that an agent's "authority terminates if the principal or the agent manifests to the other dissent to its continuance." Comment (b) explains:
>
> > The principal has power to revoke . . . although doing so is in violation of a contract between the parties and although the authority is expressed to be irrevocable. A statement in a contract that the authority cannot be terminated by either party is effective only to create liability for its wrongful termination.

As the *Government Guarantee Fund* court went on to explain later in the opinion:

> Whether or not an agency agreement is revocable is a matter of law. See *Pacific Landmark Hotel* [*Ltd., v. Marriott Hotels, Inc.*, 19 Cal. App. 4th 615, 23

> Cal. Rptr. 2d 555 (Cal. Ct. App. 1993)], 23 Cal. Rptr. 2d at 561 ("Even if the parties intended to create an irrevocable agency, one coupled with an interest, unless they do so and such an interest does in fact exist, the statutory power to revoke may be exercised. If the exercise of the statutory revocation power is contractually unjustified, damages may be in order."); *Woolley v. Embassy Suites,* [*Inc.*, 227 Cal. App. 3d 1520, 278 Cal. Rptr. 719 (Cal. Ct. App. 1991)] 278 Cal. Rptr. at 725 ("Even if the contract did attempt to restrict the power of the owner to terminate the manager, such provision would be ineffective. The principal's power of revocation is absolute and applies even if doing so is a violation of the contract or the agency is characterized as 'irrevocable.' ") (citing Restatement (Second) of Agency § 118 cmt. b). *Government Guarantee Fund*, 95 F.3d at 307.

There is one exception to this universal rule: Where the power is granted to the agent in order to protect the agent's interest in the subject matter of the agency — that is, when the agency is coupled with an interest — the principal is stripped of its power to revoke the agency:

> The only exception to the rule that principals may terminate an agency relationship at any time is when the authority granted to the agent is a "power given as security." *Id.* §§ 138, 139. [Fn. 5: This type of agency relationship also is termed a "power coupled with an interest" or an "agency coupled with an interest." 2 Samuel Williston, A Treatise on the Law of Contracts § 280 (3d ed. 1959). "The Restatement of Agency includes the so-called agency coupled with an obligation within the more general

> classification of a power given as security." *Id.* at 305 n.17.]

Government Guarantee Fund, 95 F.3d at 300.

The "power coupled with an interest" exception to the absolute right to terminate an agency contract, in and of itself, implicates the involuntary servitude prohibition contained in the Thirteenth Amendment of the United States Constitution, because it necessarily limits and restricts the power of the principle to act on his or her own rights. But even if that narrow exception to the general rule that the principal has the power to revoke an agency is accepted as constitutionally appropriate, there is no justification whatsoever for saddling a principle with an unwanted agent in any other circumstance. Yet, that is exactly what the appellate court did in this case.

The facts are undisputed: HBMP's interest in the subject matter of the agency (i.e., the litigation) was devolved on it by the partnership, HBAL, *not* the individual partners. The appointment of HBMP as the agent for the individual partners came from the partners, individually, and not from HBAL.

A power coupled with an interest does not arise *unless* the power *and* the interest derive from the same source at the same time. As noted in *Pacific Landmark Hotel v. Marriott Hotels*, 19 Cal.App.4th 615, 626, 23 Cal. Rptr. 2d 555, 561(1994):

> Moreover, while it is not necessary that the power and the interest be conferred by the same written agreement, if they are conferred contemporaneously as one entire transaction, the power and the interest must be coupled in four ways: (1) in time, (2) in subject matter, (3) in the same person, and (4) ***in source***.

(Emphasis added.)

Since the undisputed facts in this case demonstrate that the source of the *interest* (i.e., HBAL) and the source of the *power* (i.e., the Mayers) were different, they were not coupled. As such, the appointment of HBMP as the Mayers' agent was ***not*** legally irrevocable.

The connection between a contract that is not legally irrevocable and the Thirteenth Amendment's prohibition against involuntary servitude is also expressed in the *Government Guarantee Fund* case:

> In explaining why it would be inappropriate to order specific performance of the management agreement, the District Court found the rationale stated in *Woolley v. Embassy Suites* convincing:
>
> > There are a variety of reasons why courts are loathe to order specific performance of personal services contracts. Such an order would impose upon the court the prodigious if not impossible task of passing judgment on the quality of performance. *It would also run contrary to the Thirteenth Amendment's prohibition against involuntary servitude.* Courts wish to avoid the friction and social costs which result when the parties are reunited in a relationship that has already failed, especially where the services involve mutual confidence and the exercise of discretionary authority. Finally, it is impractical to require judicial oversight of a contract which calls for special knowledge, skill, or ability.

Id. at 329-30 (quoting *Woolley v. Embassy Suites*, 278 Cal. Rptr. at 727.)

Government Guarantee Fund, 95 F.3d at 303; emphasis added.

By concluding that the appointment of HBMP was irrevocable, however, the appellate court subjected the Mayers to an involuntary servitude in violation of the Thirteenth Amendment to the United States Constitution. That ruling is also in conflict with decisions of the United States Courts of Appeals.

The Petition for Certiorari should be granted in this case, not because the decision was so patently wrong, but because the effect of the appellate court's decision is very wide-ranging and implicates serious public policy concerns. Permitting irrevocability to arise in the circumstances presented opens the way to abuse by agents in commercial and business settings. Certiorari should be granted in order to delineate and confirm the rule that the limited exception to the power to discharge an agent can be applied only in the narrowest of circumstances and only when *both* the power *and* the interest flow from the same principal.

This issue is critical in the context of day-to-day business operations in this country. If the rule as expressed by the appellate court here is permitted to stand it would actually allow an employee of a company to gain an irrevocable agency status by the mere expediency of purchasing stock in the corporation. Alternatively, an existing shareholder who goes to work for the corporation would become an irrevocable agent of the corporation and not subject to termination — no matter how incompetent or disloyal. Such a circumstance fundamentally converts an employer into the virtual "slave" of the agent — a rule of law that obviously cannot be permitted to exist.

CONCLUSION

Because the appellate court's decision deals with an important Federal issue, because it conflicts with the decision of the United States Court of Appeals for the Third Circuit and because it has a significant impact on the successful operations of businesses in this country, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION THREE FILED APRIL 9, 1998

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

B110341

(Super. Ct. No. BC 027418)

JOSEPH P. MAYER III AND ELEANOR C. MAYER, ET AL.,

Plaintiffs and Appellants,

v.

ALLEN, MATKINS, LECK, GAMBLE & MALLORY, DAVID C. GRANT, and DONALD S. GOTTESMAN, ET AL.,

Defendants and Respondents.

APPEAL from a judgment of the Superior Court of Los Angeles County. Aviva K. Bobb, Judge. Affirmed.

Bonne, Bridges, Mueller, O'Keefe & Nichols, David J. O'Keefe and Robert A. Mosier for Plaintiffs and Appellants.

Appendix A

Keesal, Young & Logan, Robert H. Logan, Dawn M. Schock and Jeffrey S. Simon for Defendants and Respondents.

FACTUAL AND PROCEDURAL BACKGROUND

Huntington Breakers Apartments, Ltd. (HBAL) was a limited partnership. Its general partners were Wilmore City Development, Inc. (Wilmore, Inc.) and Joseph P. Mayer III (Mayer). HBAL's limited partners were Rose Marie Semingson, Daniel Young, and Eleanor C. Mayer (Mayer's wife). (Wilmore, Inc., Rose Marie Semingson, Daniel Young, and the Mayers sometimes will be referred to collectively as "HBAL's original partners.") HBAL was formed for the purpose of building a large apartment complex, and Huntington Breakers Managing Partnership (HBMP) was created by HBAL's original partners to manage and control HBAL.

The general contractor on HBAL's planned construction project was C. M. Driver (Driver). In 1984, HBAL and Driver entered into the construction contract for the apartment complex, and HBAL's original partners signed personal guarantees and an indemnity agreement with Driver, all for the purpose of guaranteeing payment of the construction contract.

In 1985, Driver and his construction company (collectively Driver) sued HBAL and HBAL's original partners for sums allegedly owed Driver for construction of the apartments (the *Driver* litigation). The legal interests of HBAL and HBAL's original partners of HBAL were represented in the Driver litigation by the law firm Allen, Matkins, Leck, Gamble & Mallory (hereinafter referred to as Allen Matkins).[1]

1. In addition to the *Driver* litigation, there was a "spin-off" lawsuit from the *Driver* litigation, the *Tyler/Ninth & Locust* litigation. After Driver (Cont'd)

Appendix A

Driver successfully petitioned to compel arbitration of his dispute with HBAL. The arbitrators awarded Driver approximately $4.5 million against HBAL and HBAL's general partners, Wilmore, Inc. and Mayer. This arbitration award was vacated by the trial court, but Driver appealed the trial court's decision to vacate the award, and the Court of Appeal reversed the trial court and reinstated the arbitration award.

The arbitration process and subsequent judicial enforcement proceedings related to the arbitration lasted more than four years. During that time period, HBAL sold 50 percent of its equity in HBAL to August Income Group (August Income). As one of the provisions of that sale, and to Insulate August Income's interest in HBAL from liability for the *Driver* litigation, HBAL's original partners reorganized HBAL and assigned undivided interests in the *Driver* litigation to HBAL's original partners and to HBMP

(Cont'd)

sued HBAL and the HBAL original partners, the defendants in the *Driver* litigation, plus others, filed a second amended cross-complaint in that litigation. In the twelfth cause of action of the second amended complaint, cross-complainants Ninth Street and Locust Avenue, Ltd. (Ninth & Locust), Wilmore, Inc., and Joseph Mayer sued Driver, C. W. Driver, Inc., Jon Tyler, Inc., and Somers Financial, Inc. for declaratory relief as to a note secured by deed of trust in the principal amount of $304,208.00, which was signed by the above-noted cross complainants in favor of Driver. Specifically, they sought a declaration that if they were liable on the note, they were entitled to a setoff against any liability on the note for "all claims and all amounts sought [in the cross-complaint] against cross-defendants and are entitled to the immediate return of all collateral pledged as security for the execution of said Note."

Driver subsequently filed a separate action, Case No. 613068, to foreclose the property securing the $304,208.00 note.

(the 1986 Assignment).[2] The 1986 Assignment, which was dated December 11, 1986, defined the "Lawsuit" which was the subject of the assignment as *"C W. Driver v. Huntington Breakers, Apartments, Ltd., et al.*, Orange County Superior Court No-477394, American Arbitration Association arbitration No. 72 110 1122 85, *and all successor and replacement actions and suits*." (Italics added.)

Simultaneously with the 1986 Assignment, HBAL's original partners agreed in writing as follows:

"Each Assignee [Wilmore, Inc., Mayer, Eleanor Mayer, Rose Marie Semingson, HBMP, and Daniel Young] hereby irrevocably appoints and constitutes HBMP as its true and lawful attorney in fact in connection with the Lawsuit, in his, her, or its name, place and stead to take all actions that said attorney-in-fact deems necessary, desirable or appropriate in connection with the Lawsuit, including but not limited to the right to settle or compromise the Lawsuit or the issues contained therein. It is expressly intended by each Assignee that this appointment is irrevocable and coupled with an interest."

HBMP's partnership agreement, which had been executed on August 16, 1985, provided that HBMP's actions would be decided as follows: "Each member of the [HBMP] Management Committee [Steven P. Semingson, as president of Wilmore, Inc., Daniel Young, as vice-president of Wilmore, Inc., and Mayer] shall have one vote. All Partnership decisions to be made by the General Partners [Wilmore, Inc. and Mayer] shall be made or given, as the case may be, by the affirmative vote of two-thirds (2/3) (or more) of

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2. One hundred percent of HBAL's interest in the *Driver* litigation was transferred to the assignees; HBMP received a one percent (1%) interest in that litigation.

the Management Committee. All Partnership decisions, consents or approvals made or given in the aforesaid manner shall be deemed 'Approval by the General Partner.'

"In the event that *all* of Wilmore[, Inc.]'s and R. M. [Rose Marie] Semingson's respective Units of partnership interest in the Operating Partnership [the Operating Partnership being defined as HBAL] are transferred, assigned or conveyed to parties other than Wilmore[, Inc.], Steven P. Semingson, R. M. Semingson, or [Daniel] Young, then Steven P. Semingson shall no longer be a member of the Management Committee. In the event that all of [Daniel] Young's Units of partnership interest in the Operating Partnership are transferred, assigned or conveyed to parties other than Wilmore [Inc.], Steven P. Semingson, or R. M. Semingson, then [Daniel] Young shall no longer be a member of the Management Committee. In the event that all of [Joseph] Mayer's and [Eleanor] Mayer's respective Units of partnership interest in the Operating Partnership are transferred, assigned or conveyed to parties other than [Eleanor] Mayer or [Joseph] Mayer, then [Joseph] Mayer shall no longer be a member of the Management Committee.

"In the event that any member of the Management Committee is removed as aforesaid, then the removed member of the Management Committee shall be replaced with such person as is elected by those persons and entities who hold the majority of the Units of partnership interest in the Operating Partnership then held by Wilmore[, Inc.], [Joseph] Mayer, [Daniel] Young, [Rose Marie] Semingson and [Eleanor] Mayer. Until the removed member of the Management Committee is replaced as aforesaid, decisions, consents or approvals to be made or given by the General Partners shall be made or given, as the case may be, by unanimous agreement of the remaining member(s) of the Management Committee." (Italics added.)

Appendix A

Before purchasing 50 percent of HBAL, August Income also required that its interest in HBAL be free of a mechanic's lien that Driver sought to foreclose in the *Driver* litigation. Therefore, in 1986, HBAL purchased a title policy from Transamerica Title Insurance Company (Transamerica) which made Transamerica responsible for removing the mechanic's lien. In exchange for this policy, HBAL's original partners signed an indemnity agreement to hold Transamerica harmless from its exposure. Transamerica then paid $3.9 million to settle *the Driver* litigation and to thus "purchase" Driver's judgment against HBAL, Wilmore, Inc. and Mayer.[3]

At the same time as the transaction with August Income was taking place, Wilmore, Inc., Rose Marie Semingson, and Daniel Young entered into two security agreements with PSB Realty Corporation (PSB Realty). In these agreements, Wilmore, Inc., Rose Marie Semingson and Young granted to PSB Realty a security interest in the proceeds from any settlement of or judgment in the *Driver* litigation and pledged as collateral all their right, title and interest in HBAL. However, they did not transfer their rights, title and interest in either the *Driver* litigation or HBAL, contrary to the Mayers' assertions in their opening brief.[4]

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3. After the $4.5 million arbitration award was rendered, HBAL and Transamerica negotiated a settlement with Driver for $2.1 million. Although Mayer initially voiced approval of the settlement during the meeting where it was reached, he later sent a letter to Driver saying that HBAL and Transamerica did not have authority to settle the *Driver* litigation. Therefore, the settlement fell through, and judgment was entered in the *Driver* litigation for over $4.5 million. After judgment was entered (but before the matter was litigated on appeal), HBAL and Transamerica settled the litigation for the $3.9 million noted above.

4. In fact, in an excess of caution to be sure that Mayer *(whom*

(Cont'd)

Appendix A

In 1991, the original partners of HBAL decided to pursue a malpractice action against Allen Matkins.[5] In connection with this decision, they entered into a Representation and Partial Settlement Agreement (the 1991 Representation Agreement). The 1991 Representation Agreement acknowledged that HBAL had been represented by Allen Matkins in the *Driver* litigation "and other related matters" since January 1986, and that the partners of HBAL now sought to "explore and, if warranted, pursue an attorney malpractice claim against [Allen Matkins] . . . that may be derivative from or related to the Arbitration." Therefore, "in order

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(Cont'd)

Young and Steven Semingson perceived as uncooperative and unwilling to shoulder his share of the financial burdens imposed by the *Driver* litigation) would not try to assert that this pledge to PSB Realty of Daniel Young's and Rose Marie Semingson's ownership interest in HBAL had triggered the partnership agreement's provision that a transfer, assignment or conveyance of all of a partner's ownership interest in HBAL would result in their removal from the Management Committee, Steven Semingson and Daniel Young sought Mayer's agreement that this pledge and assignment as security of their interests would not interfere with their membership on the Management Committee. According to Semingson's declaration, Mayer explicitly agreed that it would not, and agreed to demonstrate such agreement by signing the two security agreements to demonstrate he approved and consented to the agreements. Thereafter, the Management Committee met for years (from 1986 to 1994), and Steven Semingson and Daniel Young voted on issues before the Management Committee, often with Mayer in the minority, and Mayer never asserted that the two men were no longer members of the *committee* until approximately August of 1994, in connection with the Mayers' attempt to pursue their own malpractice claims against Allen Matkins.

5. In their opening Brief, the Mayers list in detail Allen Matkins' alleged professional errors. However, these details are irrelevant to the issues raised in this appeal.

to focus the efforts of Fogel[6] on the potential claims, the *parties to* this Agreement desire to enter into an arrangement for joint representation with specified rules for decision making, distribution of any recovery, and sharing of costs." The 1991 Representation Agreement provided that ultimate decisions regarding the conduct of any malpractice action against Allen Matkins would be reached by a majority vote of HBMP, and that " '[t]he management of the claim [against Allen Matkins] will *be* conducted as if the client was one individual, by the designated point man, [Joseph] Mayer, for the parties." ' However, the ultimate resolution of any decision about the management of the malpractice claim was to be made as follows: "If Wilmore[, Inc.] and [Joseph] Mayer cannot resolve the issue, the undersigned parties [HBAL's original partners] irrevocably grant to [Steven] Semingson, [Daniel] Young and [Joseph] Mayer one vote, each. [Steven] Semingson, [Daniel] Young and [Joseph] Mayer will independently assess the merits of the issue and vote to resolve it with a majority vote controlling." The 1991 Representation Agreement also gave HBMP a one percent (1%) interest in any recovery against Allen Matkins.

In 1991, HBAL and the original partners made an agreement with Transamerica, which, as noted above, had paid $3.9 million to settle the *Driver* litigation, whereby Transamerica agreed to bankroll the malpractice action against Allen Matkins in exchange for being first in line for any proceeds from such malpractice action, which proceeds would be used to pay off (1) the $3.9 million it had paid to settle the *Driver* litigation and (2) the attorney fees and costs it had paid to bankroll the malpractice action (the 1991 Cases

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6. "Fogel" was the term used to signify Fogel, Feldman, Ostov, Ringler & Klevens, the law firm with whom HBAL and HBAL's original partners were exploring the potential malpractice action against Allen Matkins.

Agreement). As part of the 1991 Cases Agreement, Transamerica required that the parties to the malpractice action adopt some method by which they would speak with one voice as to the management of the malpractice action. The majority rule method used by HBMP satisfied Transamerica's requirement for such unanimity, and therefore the HBMP partnership agreement, the 1986 Assignment, and the 1991 Representation Agreement were all appended to and incorporated by reference into the 1991 Cases Agreement.

After the 1991 Cases Agreement was executed, the Mayers contended that they were not bound by the $3.9 million settlement of the *Driver* litigation. Driver brought a motion to enforce the settlement agreement, and the trial court in the *Driver* litigation. Judge Knox, made an express finding that the Mayers *were* bound by HBMP's decision to settle the *Driver* litigation because of the 1986 assignment, and ordered the settlement agreement enforced. The Mayers did not take an effective appeal from this order.[7]

Meanwhile, the malpractice action against Allen Matkins was proceeding. Allen Matkins had filed a cross-complaint against HBAL and HBAL's original partners for unpaid attorney fees. Judge Lower was the trial court judge in the malpractice action; the action, however, was reassigned to Judge Bobb. After this reassignment to Judge Bobb, Allen Matkins filed a motion for summary judgment or summary adjudication of issues on the issue of whether the Mayers had standing to pursue the malpractice claim against Allen Matkins in their (the Mayers') individual capacities (as opposed to the malpractice claim being pursued on behalf of HBAL and its original partners as determined by

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7. The Fourth District Court of Appeal made the determination that there was no effective appeal from this order in Appeal Nos. G015658 and G016940.

HBMP). Judge Bobb denied Allen Matkins' motion for summary judgment or summary adjudication of this issue on the procedural ground that the motion did not fully adjudicate a cause of action, defense, claim for damages or issue of duty as required by Code of Civil Procedure section 437c, and otherwise appeared to require resolution of disputed issues of fact.[8] The trial court, although it denied the motion, notably did not make any finding as to specific issues of fact which were in dispute, as would be required by Code of Civil Procedure section 437c, subdivision (g).

Shortly before trial in the malpractice action was to begin, Allen Matkins (as defendant) and all HBAL'S original partners except for the Mayers (as plaintiffs) brought motions seeking leave to resolve the standing issue vis-a-vis the Mayers by way of motions in limine. Their motions for leave to resort to motions in limine were granted. Thereafter, HBAL (as plaintiff in the malpractice litigation) and Allen Matkins (as defendant in that litigation) brought separate motions in limine on the standing issue. Based on the 1986 Assignment, the 1991 Representation Agreement, and the 1991 Cases Agreement, the trial court granted *HBAL's* motion in limine, ruling that the Mayers were not the real parties in interest to prosecute any claims in the malpractice action other than their own personal and individual claims for emotional distress.

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8. The court's order stated: "[Allen Matkins'] Motion for Summary Adjudication of Issues is denied. Section 437c[f][1], Code of Civil Procedure, allows summary adjudication in order to dispose of an entire cause of action, claim or affirmative defense against all parties, not some of the parties. [¶] The Court has been requested by the parties to determine the standing of the individual plaintiffs to bring this action. The court cannot decide this issue because there may be an issue of material fact as to whether [Allen Matkins] represented these individuals [i.e., the Mayers]."

Appendix A

Some two months after the trial court granted HBAL's motion in limine, the Mayers attempted to vacate the order granting the motion in limine, or to limit its scope. This motion to vacate the order or limit its scope was denied as untimely and as an improper motion for reconsideration.

On December 4, 1996, the Mayers moved for a new trial and sought to have the August 1995 order re standing set aside, based on the same arguments made in their motion to vacate the order or limit its scope. The trial court denied this motion, too, ruling that "[t]he 1986 assignment gave control of the entire prosecution of this litigation to HBMP."

On January 10, 1997, the Mayers filed a motion for clarification/reconsideration of the order denying their motion for a new trial. When Allen Matkins opposed this motion, the Mayers withdrew it. It was in this motion that the Mayers raised for the first time as an issue the fact that the 1986 Assignment upon which the trial court had relied to conclude that the Mayers lacked standing did not apply to the *Tyler/Ninth Street* litigation. Of course, since the Mayers withdrew this motion, the trial court did not consider the argument that the *Tyler/Ninth Street* litigation was not covered by the terms of the 1986 Assignment.

After a few more procedural skirmishes which are not relevant to the ultimate outcome on appeal, Allen Matkins and all the plaintiffs in the malpractice action except for the Mayers settled the malpractice action and Allen Matkins' cross-complaint for unpaid attorney fees. In consideration for mutual releases, Allen Matkins paid the non-Mayer parties and Transamerica $4.75 million. Shortly thereafter, the trial court granted Allen Matkins' motion for summary judgrnent against the Mayers as to the Mayers' emotional distress claims. Allen Matkins subsequently

dismissed its cross-complaint, and thus all claims were resolved. On January 16, 1997, the trial court therefore entered final judgment, on a form prepared by the Mayers, which stated that "non-party [HMBP] is the sole real party-in-interest as to the [sic] all of the Mayers['] interest in this litigation . . ." On March 12, 1997, the Mayers filed timely notice of appeal.

CONTENTIONS ON APPEAL

The Mayers contend that (1) the trial court improperly granted HBAL's motion in limine re standing (thus precluding the Mayers from litigating their alleged individual claims), (2) the 1986 Assignment of control over the "Lawsuit" to HBMP does not apply to the *TylerlNinth Street litigation* nor to their "individual claims"/"individual rights"/"separate rights" in the *Driver* litigation; and (3) even if the 1986 Assignment applied to their "individual claims"/individual rights"/"separate rights"[9] in the *Driver* litigation, (a) the assignment to HBMP was revocable because it was not coupled with an interest, (b) in any event their power of revocation was absolute, and they did, in fact, revoke the agency, (c) Allen Matkins has no standing to challenge the irrevocability of the agency appointment, (d) Allen Matkins' position has always been

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9. The Mayers use these different terms to describe the interest which they allegedly retained regardless of the various agreements between HBAL, HBMP, and HBAL's original partners, including the Mayers, as to management of the Lawsuit. However, they never define the nature of this interest — is it particular causes of action, like their causes of action for intentional emotional distress? Is it their ownership interests in HBAL? Is it their expectation of recovering money from Allen Matkins, which money represented the damages the Mayers, as opposed to the other parties (HBAL, HBMP, the other partners of HBAL) suffered as a result of Allen Matkins' malpractice?

that the Mayers were their individual clients,[10] and (c) even if only HBMP, not the Mayers, was entitled to manage the Lawsuit and authorize its settlement, this matter must be remanded because Joseph Mayer was the sole voting member of HBMP's Management Committee, and Joseph Mayer "has voted to prosecute the "the claims of Joseph and Eleanor in the below action."

Allen Matkins; disputes these contentions, and contends that (1) Judge Knox determined that the Mayers never revoked the 1986 Assignment, and Judge Baker determined that the Mayers lacked standing to sue because of the HBAL partnership agreement and the 1986 Assignment, and these two determinations were res judicata and/or collaterally estopped the Mayers from asserting otherwise, (2) in any event, the Mayers could not revoke the assignment to HBMP of control over the Lawsuit because the assignment was expressly irrevocable *and* coupled with an interest, *and* created by multiple principals, (3) the Mayers' alleged revocation of the assignment of litigation control to HBMP was belied by their reaffirmation of the assignment in subsequent years, (4) under the terms of the HBMP agreement and as evidenced by his actions, Joseph Mayer did not become the sole voting member of HBMP, (5) the *Tyler/Ninth Street* litigation and the Mayers' individual claims/interests in the Lawsuit were assigned to HBMP for management, and, in any event, the Mayers did not effectively assert otherwise as to the *Tyler/Ninth Street* litigation in the trial court, and (6) there is simply no relevant basis upon which the result in this case could be other than it is.

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10. This particular point is not really a contention; it is merely a description of a circumstance. For example, the Mayers do not argue that, because Allen Matkins always recognized that the Mayers were Allen Matkins' individual clients, this somehow negated the agreement between the Mayers and their partners as to the management and control of the Lawsuit, including the circumstances under which the *Driver* litigation could be settled.

Appendix A

DISCUSSION

1. HBAL's Motion in Limine Was a Proper Procedure by Which to Determine Whether the Mayers Could Participate in the Malpractice Action in Some Capacity Other than as Partners in HBAL

One who invokes the judicial process does not have "standing" if he or she, or those whom he or she properly represents, does not have a real interest in the ultimate adjudication because he or she, or those whom he or she properly represents, has neither suffered nor is about to suffer any injury of sufficient magnitude reasonably to assure that all of the relevant facts and issues will be adequately presented. (*California Water & Telephone Co. v. County of Los Angeles* (1967) 253 Cal.App.2d 16, 22-23.)

Standing to sue is sometimes referred to as the real party in interest requirement. Standing to sue depends on the existence of a cause of action, i.e., whether the plaintiff has a right to relief. (Weil & Brown, Cal. Practice Guide. Civil Procedure Before Trial (The Rutter Group 1997) 12:3.1, p. 2-2; 5 Within, Cal. Procedure (1997) Pleading, § 917, p. 376.) The purpose of the real party in interest requirement is to assure that any judgment rendered will bar the owner of the claim sued upon from relitigating it, and to thereby save the defendant, against whom a judgment may be obtained, from further harassment or vexation at the hands of some other claimant to the same demand. (Well & Brown, Cal. Practice Guide: Civil Procedure Before Trial, *supra,* § 2:4, p. 2-2 and case cited there.)

Lack of standing to sue is such a fundamental defect that it is not waived by failure to object, and may be raised at any time

before judgment. (Code Civ. Proc., § 430.80; Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial, *supra*, ¶ 2:78, pp. 2-20 to 2-21 and cases cited there.) It may be raised by either a general demurrer or by an objection to evidence, e.g., by a motion in limine, (*Parker v. Bowron* (1953) 40 Cal.2d 344, 351; *Wagner v. Benson* (1980) 101 Cal.App.3d 27, 32; *see also Edwards v. Centex Real Estate Corp.* (1997) 53 Cal.App.4th 15, 26 [an objection to all evidence is essentially the same as a general demurrer or motion for judgment on the pleadings, and is properly sustained when, even if the plaintiffs allegations were proven, they would not establish a cause of action].)

Thus, in this case, HBAL, the limited partnership, could properly challenge the Mayers' standing to separately participate in the malpractice action, thus raising the question of whether the Mayers had a right to relief against Allen Matkins separate and apart from their right to relief as partners in HBAL, and could do so by means of a motion in limine.

2. *The Trial Court Correctly Concluded that the Mayers Lack Standing*

a. *The Mayers Are Barred from Relitigating this Issue by the Doctrine of Res Judicata*

In the malpractice action, HBAL and Allen Matkins both argued in support of the motions in limine that the doctrines of res judicata and collateral estoppel should bar the Mayers from attempting to assert that they had standing to sue Allen Matkins on their alleged individual claims arising out of the *Driver* litigation. HBAL and Allen Matkins relied on the facts that (1) in connection with the settlement of the *Driver* litigation, the Mayers had contended that they were not bound by the $3.9 million settlement

of the *Driver* litigation, and that Allen Matkins was not representing the Mayers individually and could not settle their claims in the *Driver* litigation, (2) this caused Driver to bring a motion to enforce the settlement agreement, (3) because the trial court in the *Driver* litigation, Judge Knox, granted the motion to enforce the settlement agreement, and ordered the cross-complaint in the *Driver* action dismissed with prejudice, it necessarily had to have determined that the Mayers had not revoked the 1986 Assignment, and that the Mayers *were* bound by HBMP's decision to settle the *Driver* litigation (which litigation included Driver's causes of action against the individual HBAL original partners based on those partners' guarantees and indemnity agreements), and (4) in Appeal Nos. G015658 and G016940, the Fourth District Court of Appeal made the determination that the Mayers did not take an effective appeal from this order, which therefore became final. For the reasons discussed below, we conclude that this is a viable basis upon which to affirm the trial court's decision in the malpractice action.

"The doctrine of res judicata gives conclusive effect to a final judgment rendered upon the merits by a court having jurisdiction of the cause. [Citation.] 'The rule is based upon the sound public policy of limiting litigation by preventing a party who has had one fair trial on an issue from again drawing it into controversy.' [Citation.] 'Restatement Second of Judgments views the doctrine as a bar or merger applicable to subsequent litigation between the same parties concerning the same controversy with very few exceptions. The Restatement's approach is based on the assumption that there has been an opportunity in the first litigation for a fair and full healing of the claim asserted. Once that opportunity has been afforded, the Restatement Second asserts, fairness dictates that the controversy in question be put to rest.' . . . [Citation.]" (*Schultz v. Harney* (1994) 27 Cal.App.4th 1611, 1619-1620, italics in original omitted.)

Appendix A

What constitutes the "same controversy" for purposes of res judicata? We have the past adopted four criteria for an examination of this issue: " '(1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts. [Citation.] The last of these criteria is the most important.' [Citation.] To put it another way, if 'the second suit is on a different cause of action, as where there are successive breaches of an obligation, or separate and distinct torts, or new rights accrued since the rendition of the former judgment there is no merger.' (7 Witkin, Cal. Procedure [(3d ed. 1985)] Judgment, § 246, p. 685, italics added. See also *Langley v. Schumacker (1956)* 46 Cal.2d 601, 602-603; *Craig v. County of Los Angeles* (1990) 221 Cal.App.3d 1294, 1299)", *(Coca-Cola Bottling Co. v. Lucky Stores, Inc.* (1992) 11 Cal.App.4th 1372, 1379-1380.)

The Mayers' claims in the *Driver* litigation that they had individual claims against Driver which were not the subject of the 1986 Assignment, and that therefore they were not bound by HBAL's and the original partners' settlement with Driver, arise from the same transactional nucleus of facts as do the Mayers' claims in the malpractice action against Allen Matkins that they had individual claims for malpractice against Allen Matkins which were not the subject of the 1986 Assignment or the 1991 Cases Agreement and 1991 Representation Agreement, and that therefore they were not bound by HBAL's and the original partners' settlement with Allen Matkins. Those facts are that whatever legal interests the Mayers had which were related to the *Driver* litigation would necessarily have to be the same legal interests which were impaired, if at all, by any professional negligence by Allen Matkins

during the *Driver* litigation. Because Judge Knox necessarily decided that the Mayers had given up any rights to control the disposition of those individual legal rights through litigation, including settlement, and had no power to revoke the assignment of such control to HBMP, it also follows that the Mayers gave up any rights to pursue any individual recourse for the damage to such rights caused by legal malpractice as well as. In other words, if the Mayers had any viable claims against Driver, such claims could be satisfied in one of two ways: either by (1) successful prosecution of the claims against Driver, or, (2) in the event of professional negligence which prevented successful prosecution of the claims against Driver, then by a successful malpractice against the attorneys whose negligence prevented such successful prosecution against Driver. Thus, in the *Driver* litigation and in the malpractice action against Allen Matkins, the Mayers' claims are the same, and the desired recovery is the same: only the source of the recovery is different. Therefore, if res judicata did not apply, the Mayers would have standing to separately pursue recovery against Allen Matkins for the same rights as to which, in the *Driver* litigation, it was conclusively established that they had no standing to separately pursue recovery against Driver and the other cross-defendants in the *Driver* litigation.

b. Even If Res Judicata Did Not Apply, The Mayers Would Still Lack Standing to Pursue Their Claims Against Allen Matkins

The evidence before the trial court showed that the Mayers were parties to the 1991 Representation Agreement. The 1991 Representation Agreement acknowledged that HBAL had been represented by Allen Matkins in the *Driver* litigation *"and other related matters"* since January 1986, (Italics added) and that they and the other partners of HBAL sought to "explore and, if

warranted, pursue an attorney malpractice claim against [Allen Matkins] . . . *that may be derivative from or related to the Arbitration."* (Italics added.) The 1991 Representation Agreement provided that the parties, including the Mayers, desired to enter into an arrangement for "*joint representation* with specified rules for decisionmaking, distribution of any recovery, and sharing of costs." (Italics added.) The 1991 Representation Agreement provided that ultimate decisions regarding the conduct of any malpractice action against Allen Matkins would be reached by a majority vote of HBMP, that "[t]he management of the claim [against Allen Matkins] will be conducted as if the client was one individual, by the designated point man, [Joseph] Mayer, for the parties," and that ultimate resolution of any decision about the management of the malpractice claim was to be made as follows: "If Wilmore[, Inc.] and [Joseph] Mayer cannot resolve the issue, the undersigned parties [HBAL's original partners] irrevocably grant to [Steven] Semingson, [Daniel] Young and [Joseph] Mayer one vote, each. [Steven] Semingson, [Daniel] Young and [Joseph] Mayer will independently assess the merits of the issue and vote to resolve it with a majority vote controlling." The 1991 Representation Agreement also gave HBMP a one percent (1%) interest in any recovery against Allen Matkins. This method of deciding the course of the malpractice action against Allen Matkins was reaffirmed by the parties when they entered into the Cases Agreement with Transamerica in order to obtaining funding to pursue the malpractice action.

Contrary to the Mayers' contentions on appeal, the evidence presented to the trial court showed that the 1991 Representation Agreement clearly applied to the *Tyler/Ninth Street* litigation, which, having been raised in the cross-complaint in the *Driver* litigation, and seeking as it did a setoff against any sums which might be owed to Driver on the complaint, was obviously a

"related matter," and, notably, the Mayers did not offer evidence that the reference in the 1991 Representation Agreement to "related matters" applied to any other litigation. The closely-related nature of the *Driver* and *Tyler/Ninth Street* actions was even evidenced by the complaint in the malpractice action itself, which alleged that Allen Matkins was negligent because it failed to have the *Tyler/Ninth Street* action coordinated and consolidated with the *Driver* litigation.

Also contrary to the Mayers' contentions on appeal, there was no evidence that the Mayers could revoke their consent to this method of managing the malpractice action. The assignment of the right to control the litigation to HBMP was an assignment coupled with an interest in the proceeds of the malpractice action (the one percent interest having been given to HBMP), and thus it was irrevocable. (Civ. Code, § 2356, subd. (a); *Becket v. Welton Becket & Associates* (1974) 39 Cal.App.3d 815, 820.) In addition, because HBMP's authority to manage the litigation was created by multiple principals, i.e., HBAL's original partners, such authority cannot be revoked by the unilateral action of one or two principals, i.e., the Mayers, in contravention of the agreement between the principals. (*See Diaz v. United California Bank* (1977) 71 Cal.App.3d 161, 166; *Wade v. Lake County Title Co.*, (1970) 6 Cal.App.3d 824, 828; *Womble v. Wilbur* (1906) 3 Cal.App. 535, 547.)

Finally, the Mayers' argument that when Rose Marie Semingson and Daniel Young pledged their interests in HBAL to PBS Realty as collateral Joseph Mayer became the sole voting partner of HBMP (and thus could and should have had the right to control the malpractice litigation) is without merit. By its terms, the HBMP partnership agreement does not provide that members of the Management Committee may be removed for pledging their

interests in HBAL as collateral or assigning their interests as security; only one who has transferred, assigned or conveyed all ownership interest in the partnership may be removed as a member of the management committee.

That this is the correct interpretation of the HBMP partnership agreement was further evidenced by the evidence presented to the trial court that Joseph Mayer knew of the pledge/assignment to PBS Realty and continued to act as though Steven Semingson and Daniel Young were proper members of the Management Committee, even when they continued to outvote him on matters of some importance.

Based on the foregoing, it is clear that it was. HBMP, through its Management Committee, that had the sole right to manage the malpractice action, and that the Mayers had no right to pursue any individual claims against Allen Matkins, and thus had no standing in the malpractice action.

DISPOSITION

The judgment is affirmed. Defendants are awarded their costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CROSKEY, Acting P. J.

We concur.

KITCHING, J.

ALDRICH, J.

APPENDIX B — JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES FILED JANUARY 16, 1997

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

CASE NO. BC 027418

HUNTINGTON BREAKERS APARTMENTS, LTD., et al,

Plaintiffs,

ALLEN, MATKINS, LECK, GAMBLE & MALLORY et al.,

Defendants.

JUDGMENT

THIS COURT, having on December 16, 1996 denied the motion for new trial by plaintiffs and cross-defendants Joseph P. Mayer, III and Eleanor C. Mayer ("Mayers"), by ruling the Mayers are not the real parties-in-interest to bring actions for

malpractice against defendants Allen, Matkins, Leck, Gamble & Mallory, David C. Grant and Donald S. Gottesman ("defendants") for defendants representation of the Mayers in two separate actions titled *C.W. Driver v. Huntington Breakers Apartments, Ltd.*, Orange County Superior Court Case number 477394, and *Jon Tyler, Inc., v. Wilmore City Development, Inc.*, Los Angeles Superior Court Case number C613068, and (that non-party Huntington Breakers Managing Partnership (HBMP) is the sole real party-in-interest) as to the all of the Mayers interests in this litigation, including all claims against defendants arising from defendants representation of the Mayers as individuals,

ORDERS, ADJUDGES, AND DECREES that Joseph P. Mayer III and Eleanor C. Mayer shall take nothing, and that Allen, Matkins, Leck, Gamble & Mallory, David C. Grant, and Donald Gottesman shall recover from Joseph P. Mayer, III and Eleanor Mayer costs of suit to be awarded according to a bill of costs which will be submitted at a later date.

Dated: January 16, 1997

[stamp] AVIVA K. BOBB [stamp]
JUDGE OF THE SUPERIOR COURT

APPENDIX C — ORDER OF THE SUPREME COURT OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION THREE, NO. B110341 FILED JULY 15, 1998

Second Appellate District, Division Three, No. B110341
S070426

IN THE SUPREME COURT OF CALIFORNIA

JOSEPH P. MAYER III Et Al., Appellants

v.

ALLEN MATKINS LECK GAMBLE & MALLORY, Et Al., Respondents

Appellants' petition for review is DENIED.

[stamp] GEORGE [stamp]
Chief Justice